STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LOWE'S HOME CENTERS, INC.	:	ORDER DTA NO. 818411
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ending January 31, 1997 and January 31, 1998.	:	

Petitioner, Lowe's Home Centers, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending January 31, 1997 and January 31, 1998.

On December 31, 2002 petitioner, by its attorneys, Phillips, Lytle, Hitchcock, Blaine & Huber (Edward M. Griffith, Esq., of counsel) filed a motion for an order striking from the record the post-hearing affidavits of the expert witnesses for the Division of Taxation ("Division"), Dr. Ednaldo A. Silva and Dr. Alan C. Shapiro. The Division, by Barbara G. Billet, Esq. (Nicholas A. Behuniak, Esq., and Robert Tompkins, Esq., of counsel), filed an answering brief and an affidavit in opposition to petitioner's motion. Based on the pleadings, the motion papers and other documents filed by the parties, Gary R. Palmer, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioner commenced this proceeding by filing a petition with the Division of Tax Appeals on or about March 26, 2001. The petition was filed in protest of a notice of deficiency

dated December 26, 2000, which asserted additional tax due in the sum of $346,412.00 plus penalty and interest for the fiscal years ending January 31, 1997 and January 31, 1998.

2. Following a hearing that spanned 21 days commencing on March 13, 2002 and concluding on November 7, 2002, the record was kept open, without objection by either party, for the purpose of permitting the Division to submit two rebuttal affidavits on or before December 20, 2002, and for petitioner's response thereto by affidavit due not later than February 5, 2003. On December 20, 2002 the Division filed the affidavits of Dr. Alan C. Shapiro and Dr. Ednaldo A. Silva. By notice of motion dated and served on December 31, 2002 with supporting papers, petitioner moved for an order striking the Shapiro and Silva affidavits from the record on the grounds that the affidavits restate conclusions of the Division's expert witnesses rather than facts in violation of 20 NYCRR 3000.15(d)(1), and that the affidavits constitute supplemental expert reports, or, in the case of Dr. Silva, the expert report that should have been, but was not, filed in advance of his testimony. It is petitioner's position that expert reports coming into the record in the form of post-hearing affidavits are prejudicial to petitioner because the affiants cannot be cross examined as to the content of these "reports."

3. In response, the Division argues that petitioner's attorneys agreed to the use of rebuttal affidavits without objection and that because petitioner's rebuttal expert witnesses, Dr. William J. Coyle and Dr. Irving Plotkin, each gave testimony that was beyond the scope of rebuttal, the Division now has the right to respond to such improper rebuttal testimony, and further, petitioner suffers no prejudice because it has the right to submit affidavits in response to the Division's affidavits.

CONCLUSIONS OF LAW

A. The affidavits filed by the Division were filed in compliance with the ruling of the Administrative Law Judge regarding post-hearing affidavits. Because these affidavits purport to respond to the testimony of petitioner's rebuttal witnesses, they constitute surrebuttal affidavits. The function of surrebuttal is to explain away or deny new facts, or in the case of expert testimony, new conclusions put forth by the opposing party on rebuttal. Such new facts or conclusions include matter on which the responding party has the burden of proof. However, new facts or conclusions on rebuttal that do not respond to new facts or conclusions raised by the answering party in its case-in-chief or on cross examination are beyond the proper scope of rebuttal and render superfluous any surrebuttal. In ***Yeomans v Warren*** (87 AD2d 713, 448 NYS2d 889), the court stated,

> Rebuttal proof should not contradict or corroborate evidence already presented but, rather, must be evidence in denial of some affirmative fact (or conclusion) which the answering party has endeavored to prove (citation omitted).

Put another way and in terms of this case, rebuttal proof should not include matter that should have been part of petitioner's case-in-chief. Such proof is properly restricted to meeting new matter brought out by the Division in its cross examination or its case-in-chief (***see, Hutchinson v Shaheen***, 55 AD2d 833, 390 NYS2d 317).

B. Petitioner's motion to strike the Division's affidavits is granted, not because the affidavits violate 20 NYCRR 3000.15(d)(1), but because they serve no useful purpose in this proceeding. The Division's remedy is to highlight in its brief any portions of the testimony of

Dr. Coyle and Dr. Plotkin that it contends are beyond the proper scope of rebuttal and should be disregarded by the Administrative Law Judge.

DATED: Troy, New York
January 30, 2003

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE